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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 358.

EMIL STEIN, *Petitioner*,

v.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR REHEARING.

GEORGE P. BARSE,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Comes now Preston Delano, Comptroller of the Currency and Roger E. Brooks, Receiver of the New Jersey National Bank & Trust Company of Newark, New Jersey, the respondents in the above entitled cause and present this their brief in opposition to the petition for rehearing and in support thereof respectfully show:

1. For a statement of the position of the Comptroller of the Currency in opposition to the petition for rehearing we respectfully invite attention to the letter of the Comptroller

of the Currency dated October 25, 1941, to Saul J. Zucker, Esq., attorney for the petitioner. (Appendix p. 4)

2. Petitioner's statements, pages 2, 4 and 5 of the rehearing petition, that distribution of interest to depositors of other insolvent National banks is being withheld or has been withheld pending a final decision in the instant case are based on erroneous information. *Interest dividends in addition to 100% principal have been paid the depositors of the following insolvent National banks by the Comptroller of the Currency since March 2, 1940, the date the complaint was filed in the instant case*:

First National Bank & Trust Company, Fleetwood, Pennsylvania
The National Bank of Bellows Falls, Vermont
The First National Bank of Pender, Nebraska
The First National Bank of Birdsboro, Pennsylvania
The Cumberland National Bank of Fayetteville, North Carolina
The National Bank of Windsor, Vermont
Northeast Savings Bank of Washington, D. C.
The First Inland National Bank, Pendleton, Oregon
The Peckville National Bank, Peckville, Pennsylvania
The First National Bank of Honaker, Virginia
The First National Bank of Paw Paw, Michigan
The County National Bank of Clearfield, Pennsylvania
First National Bank of Saegertown, Pennsylvania
The Bank of Pittsburgh, N. A., Pittsburgh, Pennsylvania.
Farmers & First National Bank of New Castle, Indiana
California National Bank of Sacramento, California
The First National Bank of Marshall County at Plymouth, Indiana
The First National Bank of Burlingame, Kansas
The Essex National Bank of Haverhill, Massachusetts
The First National Bank in Salem, Oregon
The Citizens National Bank of Irwin, Pennsylvania

Because of the prayer for injunctive relief to restrain payment of the dividends in the instant case (R. 54, 55) it was stipulated in the trial court (R. 65), that distributions

of interest to the depositors of this bank would be withheld until this case is finally decided.

3. Certiorari and rehearing were denied by this court in *United States Savings Bank* v. *Morgenthau* (App. D. C. 1936), 85 F. (2nd) 811, cert. den. 299 U. S. 605, rehearing den. 301 U. S. 666, wherein the Appellate Court held (p. 815):

> "It is plain, however, that no part of the assets of the bank may be turned over by the receiver to the stockholders until after both the principal of the debts and the interest thereon are fully paid. In the present case the assets are not sufficient in value to pay both in full, and consequently the stockholders are not entitled to demand a restoration of the bank and its property to them." (Citing Richmond v. Irons, 121 U. S. 27.)

WHEREFORE, it is respectfully urged that the petition for rehearing be denied.

Respectfully submitted,

GEORGE P. BARSE,
Counsel for Respondents.

TREASURY DEPARTMENT
Comptroller of the Currency
Washington.

October 25, 1941.

Saul J. Zucker, Esq.,
744 Broad Street,
Newark, New Jersey.

Dear Sir:

Receipt is acknowledged of your letter of October 22nd referring to the case of *Stein* v. *Delano*, No. 358 in the present term of the Supreme Court of the United States, certiorari denied October 13, 1941, and a rehearing petition proposed to be filed in that court. In this connection you request the following information with reference to incompleted National bank Receiverships wherein it is indicated that all or part of the interest due creditors will be paid in addition to 100 per cent of the principal of the claims:

(1) The name and location of each of such banks
(2) The number of depositors at the date of suspension
(3) The number of stockholders at the date of suspension
(4) The total amount of claims allowed by the respective receivers in each bank liquidation
(5) The amount of money available to depositors or stockholders after the payment of the 100 per cent principal dividend.

As stated in the brief of the appellee filed in this case in the United States Circuit Court of Appeals the Comptroller of the Currency has paid such interest on creditor claims for over 60 years pursuant to the decisions of the Supreme Court of the United States. The appendix to the brief contains a copy of a letter from the Comptroller to a National bank Receiver dated May 18, 1878 evidencing the practice at that time. During this period all or part of the interest due on such claims has been paid in 424 Receiverships as reported to Congress in the various annual reports of the Comptroller of the Currency. Our records indicate that it will be possible to pay interest (over and above 100% principal) in only 17 of the remaining receiverships now open.

If we had before us, instead of behind us, the liquidation of the 441 receiverships (424 plus 17) in which the assets would permit payment of the principal and interest, or if we had any comparatively substantial number of unliquidated receiverships wherein the right to pay interest was seriously questioned and appeared doubtful, it would be in order to consider the desirability or advisability of obtaining a ruling from the Supreme Court. However, it is obvious that such is not the existing situation for, as hereinabove indicated, slightly over 96% of said 441 receiverships capable of paying principal and interest have been liquidated and closed, and interest to the depositors has been paid, in accordance with the long standing position of the office, based upon construction of the National Banking Statutes, in the light of the decisions of the Supreme Court and of the inferior Federal courts. The decision in the Stein case, and the denial of certiorari therein, merely confirms our view that the position hereinbefore taken upon the interest question was sound.

Therefore, it would seem to result that while it cannot be said, with strict accuracy, that the interest question is now moot, it would certainly seem that it is no longer a question of substantial class importance. In the largest of the remaining 17 receiverships above mentioned,—First National Bank-Detroit,—the interest question has been raised, and has been decided by the United States District Court in favor of the depositors, and the fact that an appeal to the United States Circuit Court of Appeals has been taken, does not, in our opinion justify this office in joining with you in asking the Supreme Court to reconsider its denial of certiorari in the Stein case and to grant a review therein, for the purpose of utilizing such decision as might be rendered upon such review as a basis for determining the issues in the Detroit case. Aside from the contingency that it remains to be seen whether the appellant in the Detroit case will carry the appeal to a conclusion, it is our best judgment that the appellate court will affirm the judgment of the trial court in the Detroit case. If, however, the decision in the appellate court in that case should be adverse to the position uniformly taken by other courts in which this question has heretofore been raised, we could consider as to whether we would then apply for a writ of certiorari to the Supreme Court.

As we indicated in our conference with you yesterday, we feel that the shareholders in the Stein case have had their day in court and that we have rendered reasonable cooperation with reference to having the issues fairly presented and determined in the trial court, the appellate court, and in the Supreme Court of the United States.

Accordingly, under the foregoing circumstances, we do not feel that we should in any way participate in asking the Supreme Court to reconsider its decision in denying the writ of certiorari in the Stein case, nor do we feel that we would be justified in expending the considerable time and expense incident thereto, which would be required in preparing the itemized information which you request.

Very truly yours,

R. B. McCandless,
Deputy Comptroller.